IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 16, 2006

STATE OF TENNESSEE v. CHRISTOPHER R. PIERCE

Direct Appeal from the Circuit Court for Stewart County
No. 4-1564-CR-04 George C. Sexton, Judge

No. M2005-01708-CCA-R3-CD - Filed July 26, 2006

A Stewart County Circuit Court jury convicted the appellant, Christopher R. Pierce, of one count of vehicular homicide, two counts of contributing to the delinquency of a minor, and one count of aiding and abetting driving under the influence (DUI). The trial court merged the DUI conviction into the vehicular homicide conviction and sentenced the appellant to concurrent sentences of twelve years for vehicular homicide and eleven months, twenty-nine days for each count of contributing to the delinquency of a minor. On appeal, the appellant claims (1) that the evidence is insufficient to support the convictions and that the trial court erred by denying his motion for judgment of acquittal and (2) that the trial court erred by denying his request for a mistrial when a State witness revealed to the jury that the appellant had been driving without a license, had a prior arrest for DUI, and had been involved in a previous car accident. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

William B. Lockert, III, and Richard Taylor, Jr., Ashland City, Tennessee, for the appellant, Christopher R. Pierce.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Dan Alsobrooks, District Attorney General; and Carey J. Thompson and Ray Crouch, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In the early morning hours of May 5, 2004, seventeen-year-old Greg Kirksey was driving a

car in which the twenty-five-year-old appellant and thirteen-year-old Kayla Smith were passengers. The car spun out of control and slammed into a tree, ejecting and killing Smith. Jeff Smith, the victim's father, testified that about 5:00 a.m. on May 5, 2004, he left home for work and was stopped by the police. The police asked Smith if Kayla was his daughter and if she was at home. Smith had last seen the victim at 9:30 p.m. the previous night and told the police that as far as he knew, his daughter was at home but that he had not checked on her before he left for work. Smith returned home, checked the victim's bedroom, and discovered she was not in bed.

Heather Smith, the victim's mother, testified that the victim was an eighth-grade student at North Stewart Elementary School and a cheerleader. On the night of May 4, 2004, the victim went to a softball field with a friend and returned home about 9:30 p.m. The victim kissed her parents goodnight, and everyone went to bed. The next morning, Jeff Smith woke his wife and said, "[D]on't panic, but Kayla's not in her bed, and there's some police officers out here and they said there was an accident and they think it was Kayla." The police drove the Smiths to the hospital, and Heather Smith identified the victim. On cross-examination, she said that the victim had never mentioned Greg Kirksey.

Greg Kirksey testified that he met the appellant in April 2004 and had known the appellant for about two weeks at the time of the wreck. Kirksey met the victim through her boyfriend and had known her for about two weeks. The victim told Kirksey that she was sixteen years old, and the victim became Kirksey's girlfriend. About 8:00 p.m. on May 4, 2004, Kirksey telephoned the appellant and asked if he wanted to go out. Kirksey had planned to buy marijuana but decided to get beer instead. The appellant drove his girlfriend's rented Chevrolet Malibu to Kirksey's home, picked up Kirksey, and drove to a BP gas station. The appellant bought two forty-ounce beers, and Kirksey and the appellant each drank one. The appellant then drove to McDonald's, where he and the appellant talked to the appellant's girlfriend, Crystal Hannon. The appellant and Kirksey left McDonald's, drove to the Speedy Mart, and bought two more forty-ounce beers. They each drank one, and about 10:30 p.m., Kirksey telephoned the victim. The victim asked him to meet her at a trailer owned by the victim's family and told him that the appellant could come with him. The appellant and Kirksey met the victim at the trailer, and the three of them talked for a while. Kirksey told the victim that his parents were probably going to kick him out of their house, and the victim told Kirksey that he could probably rent the trailer. Kirksey and the appellant talked about renting the trailer together.

Kirksey testified that about 11:00 p.m., the appellant left the trailer in order to pick up Crystal Hannon from work. The appellant and Hannon then returned to the trailer. About 11:30 p.m., the group left the trailer and dropped off Hannon at the appellant's home, and the appellant drove Kirksey and the victim to Clarksville. The appellant stopped at a convenience store, where Kirksey tried to cash a check for the victim. The appellant also went into the store and bought two forty-ounce beers. The store clerk would not cash the victim's check, and the appellant drove Kirksey and the victim to another convenience store. The second clerk would not cash the check, and the group drove back toward Dover, Tennessee about 12:30 a.m. At this point, Kirksey learned that the appellant did not have a driver's license. Kirksey also knew that the appellant had been in a recent

car accident. Kirskey told the appellant that he had a driver's license and wanted to drive the car. The appellant pulled over, and Kirksey got into the driver's seat. The victim was sitting in the backseat and had not consumed any alcohol.

Kirksey testified that he did not remember anything about the crash and did not remember having any conversations with the appellant or checking on the victim after the wreck. At the hospital, Kirksey denied that he had been driving the car. However, he said that he did so because he did not remember that he had been driving. Later, Kirksey began remembering the wreck, "felt bad for what had happened," called police officers to his home, and admitted that he had been driving the Malibu. He said that he pled guilty to vehicular homicide but that he did not yet know what his sentence would be. On the night of the crash, his blood alcohol content was 0.15%, and he had broken ribs, a fractured neck, and a lacerated liver. Kirksey testified that the appellant knew he had consumed two forty-ounce beers and that the appellant knew he was only seventeen years old "[b]ecause that night . . . he asked me how old I was, [and] I told him I'd be 18 in three weeks."

On cross-examination, Kirksey testified that he had a "buzz" at the time of the crash but was not "sloppy drunk." He acknowledged that in his first statement to police, he told them that the appellant had been driving at the time of the crash and had been driving too fast. In his second statement to police, Kirksey said that he asked the appellant to pull over so he could drive. However, he testified that he and the appellant decided together that Kirksey should drive because the appellant did not have a driver's license. He did not believe he was driving one hundred miles per hour at the time of the crash and denied telling the appellant's attorney that he checked on the victim after the wreck. He said that he did not remember the victim or the appellant telling him to slow down before the car began to spin but that the appellant told him while they were in jail together that the appellant had told him to slow down. He acknowledged that the State charged him with vehicular homicide by intoxication, a Class B felony, and vehicular homicide by reckless driving, a Class C felony, but that the charge for the Class C felony was dismissed in return for his guilty plea. He said that the appellant had a prior conviction for DUI. On redirect examination, Kirksey testified that he should not have been driving but that neither he nor the appellant was "falling down drunk" at the time of the wreck. He said that his having a "buzz" may explain why he did not realize he was driving too fast.

Rick Gusse, the Assistant Fire Chief at the Indian Mound Volunteer Fire Department, testified that when he arrived at the scene of the wreck, two men were arguing on the street, and a vehicle was wrapped around a tree. Gusse asked the men if they were hurt and if anyone else was involved. The men told Gusse no, but he heard one of them say, "[Y]ou need to tell them." Gusse asked the men at least three times if anyone else was involved in the crash. About five minutes later, Gusse learned about the victim.

Steve Atkins testified that on May 4, 2004, he arrived home from work about 11:50 p.m. and was working in his garage. About 12:45 a.m., he heard tires squeal and a crash. He drove to the scene and saw a car beside a tree. Two boys were standing near the car's passenger side, and Atkins asked if they were alright. One boy politely responded, "[Y]es, sir, we're all right, sir." Atkins

asked if anyone else was with them. The boys said no and that Atkins could "go on, sir." Atkins got his flashlight, started walking toward the car, and heard "something about a girl with us." Atkins shined his flashlight and "seen the little girl staring at me."

Dorothy Rorey testified that she was a "first responder" to accidents in the Indian Mound area and learned about the wreck from her scanner. Rorey drove to the scene and saw Steve Atkins talking to two men. One of the men was pulling on a white t-shirt. Rorey asked the men if they were hurt, and the men said no. She also asked them if anyone else was in the car, and someone said no. Rorey then heard someone yell, [T]here's one down here." Rorey asked the two men, "[W]hy didn't you tell me there was one down there?" The taller man said, "[T]his is yours, you take the heat for it." Rorey carried her equipment to the Malibu and saw the victim lying on her left side, not breathing. The victim's legs were under her, and her left arm was twisted. Rorey, a firefighter, and another first responder began cardiopulmonary resuscitation (CPR) on the victim. Rorey said that while she was helping the victim, she had left her Ford Explorer unlocked. The next day, Rorey found a bloody t-shirt in the back of the Explorer.

Rita Peters, Dorothy Rorey's daughter and a paramedic, also responded to the wreck. When she arrived, she saw two men in her mother's Explorer, and "there was one standing up like he was crawling over the front seat into the back." Peters helped emergency personnel secure the victim onto a spine board and move her to an ambulance. She then went to check on the two men. One of the men was lying on the ground and complaining about being injured. Peters assessed his condition and checked on the second man, who was sitting in the front passenger seat of Rorey's vehicle. Peters said she smelled alcohol on the victim and the two men.

Xylena Williams, a volunteer firefighter, responded to the crash. She saw two boys walking away from the car and asked if anyone else was with them. The boys said no, and Williams heard one of them say, "[M]an, you need to tell them." Williams walked to the Malibu and turned off the ignition. She saw the victim and began CPR. She said she smelled alcohol on the boys.

Lucas Denhart, an emergency medical technician (EMT), testified that when he arrived at the scene, a seventeen-year-old male patient was on a backboard and had abdominal and ribcage injuries consistent with having hit a steering wheel. A twenty-five-year-old male told Denhart that he had been a passenger in the Malibu and that the driver had been driving "fast and reckless." Denhart smelled alcohol on the twenty-five-year-old's breath. On cross-examination, Denhart testified that he also smelled alcohol on the seventeen-year-old's breath.

Paramedic Jeremy Clark testified that when he arrived at the scene, first responders were performing CPR on the victim. Clark verified that the victim had no pulse and was not breathing, and the victim was put onto a spine board and moved to an ambulance. On the way to the hospital, Clark telephoned a doctor at the hospital, and the doctor gave Clark permission to cease efforts on the victim.

Vanessa Candler, an EMT and Clark's partner, testified that en route to the wreck, she heard

a first responder say over the radio that no one was hurt in the crash. However, the first responder soon advised that another person had been found, appeared to have been ejected from the car, and had no pulse. When Candler and Clark arrived at the scene, Candler went to help the victim. She saw two males sitting in a vehicle, and the younger male told Candler that he had not been driving. The older male said, "[Y]ou might as well tell them the truth, I'm not taking the heat for this one by myself." The younger male had blood around his nostrils and on his shirt and began complaining about difficulty breathing and abdominal pain. Candler did not see any lacerations or bruises on him, but he had a strong odor of alcohol and did not want to cooperate. She said that the boy's behavior was consistent with someone who had consumed alcohol and that he also had a decreased level of consciousness, which could have been caused by alcohol consumption or a head injury. Candler did not notice a head injury, but on cross-examination, she acknowledged that a person may show no external signs of a concussion. She also acknowledged that a person who strikes his head hard enough to fracture his neck may have a head injury.

Dr. Feng Li of the Nashville Medical Examiner's Office testified that he performed the victim's autopsy. The victim had abrasions on her forehead, left cheek, left chest, arms, legs, and around her eyes. The victim had a one and one-half-inch laceration on her forehead, and her left arm was broken. The victim's thoracic aorta was completely torn, and she had blood in her chest. She also had a fractured skull, torn lung, and lacerated liver. Her blood tested negative for alcohol and drugs. Dr. Li concluded that the victim died within minutes of the crash, that her cause of death was multiple blunt force injuries, and that the manner of death was an accident.

Special Agent Jeffrey Cruz of the Tennessee Bureau of Investigation testified that on May 5, 2004, a nurse collected blood from the appellant at 3:35 a.m. and from Greg Kirksey at 3:32 a.m. The appellant's BAC was 0.11%, and Kirksey's BAC was 0.15%.

Deputy Shawn Noble of the Stewart County Sheriff's Department responded to the scene of the wreck and spoke with the appellant. The appellant told Noble that Kirksey had been driving and that they each had consumed two forty-ounce Colt 45 beers.

Sabine Donnelly testified that she worked at The Pantry convenience store on Dover Road. On the morning of May 5, 2004, two men came into the store, and one tried to cash a check while the other bought beer. Donnelly acknowledged that a receipt showed one of the men bought Colt 45 beer and Chex Mix at 1:09 a.m. A video surveillance tape also showed the purchase, and the State played the videotape for the jury. The appellant stipulated that a second convenience store clerk would have testified that about midnight, a white male eighteen to twenty years old came into the store and tried to cash a check.

Trooper Shawn Boyd of the Tennessee Highway Patrol's Critical Incident Response Team (CIRT) testified that he was a certified accident reconstructionist and investigated the wreck. He stated that as the Malibu came over a rise in the road, it began to rotate clockwise. The car left the road and entered the grass. Skid marks showed that the car traveled a total of two hundred fifty three feet, hit a tree sideways, rotated counter-clockwise, and ejected the victim through the back window.

Trooper Boyd calculated that the car was traveling at a minimum speed in the mid-seventy-mile-per-hour range when it struck the tree. No one in the car was wearing a seatbelt.

Sergeant John Albertson of the CIRT testified that he downloaded information from the car's crash data retrieval box and generated a report. Five seconds before the car hit the tree, the car was traveling at ninety-eight miles per hour; four seconds before impact, ninety-four miles per hour; and three seconds before impact, seventy-eight miles per hour. Although airbags are designed to deploy in a head-on collision, the car's velocity change was so severe that its side impact with the tree deployed the airbags. The retrieval box data showed that Greg Kirksey applied the brakes before impact, but Sergeant Albertson did not know when he applied the brakes. On cross-examination, Sergeant Albertson testified that the posted speed limit was forty-five miles per hour.

Special Agent Jimmy Turner of the Tennessee Highway Patrol's Criminal Investigation Division testified that he interviewed the appellant at 6:25 a.m. on May 5. At that time, the appellant was a possible suspect because it was still unclear as to who had been driving the car at the time of the wreck. Agent Turner wrote out the appellant's statement in which the appellant said the following: About 7:00 p.m. on May 4, Greg Kirksey telephoned the appellant and asked if the appellant would drive Kirksey to the victim's house. The appellant took Crystal Hannon to work and returned home. Kirksey telephoned the appellant again and asked the appellant to pick him up. About 8:45 p.m., the appellant drove to Kirksey's house, and they returned to the appellant's home. About 10:15 p.m., the appellant drove Kirksey to meet the victim at a trailer. The appellant got beer out of the trailer's refrigerator and drank one forty-ounce Colt 45 and one forty-ounce Budweiser. The appellant saw Kirksey drinking Colt 45, and Kirksey told the appellant that he had already consumed one forty-ounce Budweiser. The appellant looked around the trailer, and the victim told him it was for rent. He left the trailer, picked up Hannon from work, and returned to the trailer with Hannon about midnight. The group left the trailer with the appellant driving Hannon's rental car. The group dropped Hannon off at Hannon's and the appellant's home, and the appellant "drove off a ways." The appellant had seen some police officers earlier in the evening and got nervous because he did not have a driver's license. Kirksey told the appellant that he had a license, so the appellant pulled over and Kirksey began driving. Kirksey drove to the BP gas station and went inside to cash a check. When Kirksey came outside, the appellant went inside to use the restroom. The group left the gas station about 1:00 a.m., and Kirksey was driving.

According to the appellant's statement, Kirksey turned off Dover Road onto Highway 79, almost hit a road sign, and began driving faster. The appellant told Kirksey to slow down, heard a "boom," and felt the car going too fast for the road. After the wreck, the appellant got out of the car and saw that the victim had been thrown out. Kirksey got out, leaned over the victim, and said to the appellant, "I can't go down for this. . . . You were driving." The appellant told Kirksey that Kirksey "needed to take the heat for this." Someone pulled up to the scene and asked if everything was alright. Kirksey shouted out "[Y]eah," but the appellant said, "[N]o, everybody is not fine." Agent Turner testified that the appellant signed the statement and was calm. He did not remember smelling alcohol on the appellant.

Agent Turner testified that Greg Kirksey gave a statement on May 6 while in the hospital. According to the statement, the appellant picked up the victim at 8:20 p.m. on May 4. At 8:36 p.m., they drove to the BP gas station, and the appellant bought two forty-ounce Bud Lights and gave the appellant one. They returned to the appellant's house and drank the beer. At 8:45 p.m., they visited Crystal Hannon at work and returned to the appellant's home, where they "finished off the beer." The appellant drove Kirksey to the Speedy Mart convenience store, and the appellant bought two more forty-ounce Bud Lights. The appellant and Kirksey rode around and drank the beer. About 10:30 p.m., Kirksey telephoned the victim, and the appellant drove Kirksey to her home. The appellant parked at the bottom of the victim's driveway, and he and Kirksey met the victim at a nearby trailer. The appellant and Kirksey took their beer into the trailer with them. About 11:15 p.m., the appellant left the trailer in order to pick up Hannon from work. He and Hannon returned to the trailer, and the group left the trailer with the appellant driving the car. The appellant dropped off Hannon at the appellant's house and then drove Kirksey and the victim to The Pantry convenience store to cash the victim's check. The appellant bought two forty-ounce Colt 45 beers. At 1:00 a.m., the group drove to the Minute Mart in another attempt to cash the victim's check. They left the Minute Mart convenience store and drove toward Dover. The victim was sitting in the backseat. The appellant had been driving a little fast, and Kirksey did not remember anything else.

Agent Turner testified that on May 11, Kirksey contacted the police and gave a second statement. In that statement, Kirksey said that while the appellant was driving toward Dover, Kirksey asked the appellant to pull over so he could drive. The appellant pulled over to let Kirksey drive, and Kirksey began driving fast. He did not remember wrecking the car or taking off his shirt. According to the statement, Kirksey had consumed two forty-ounce beers and was drinking a third beer at the time of the crash. Agent Turner noted that there were important inconsistencies in Kirksey's and the appellant's statements. Specifically, the appellant never said in his statement that he bought beer, whereas Kirksey alleged that the appellant bought beer at three convenience stores. Moreover, videotape surveillance from one of the stores confirmed that the appellant bought beer. Agent Turner said that the police found beer bottles at the scene of the wreck, and he acknowledged that the appellant obviously lied in his statement to police.

On cross-examination, Agent Turner testified that he did not record the appellant's interview. He acknowledged that Kirksey never mentioned having a "buzz" or telling the appellant he was not eighteen years old. Kirksey also never told Agent Turner that he knew the victim was only thirteen years old. Agent Turner said that he did not confirm that the appellant purchased beer at the other two convenience stores but that he should have done so. The jury found the appellant guilty of vehicular homicide by intoxication, a Class B felony; two counts of contributing to the delinquency of a minor, a Class A misdemeanor; and aiding or abetting DUI, a Class A misdemeanor.

II. Analysis

A. Sufficiency of the Evidence

The appellant claims that the evidence is insufficient to support the convictions and that the

trial court erred by refusing to grant his motion for judgment of acquittal.[1] First, he claims there is no evidence that he knew or should have known that Greg Kirksey was impaired. In support of this argument, he notes that no emergency personnel who responded to the wreck testified that Kirksey had red eyes, slurred speech, disheveled clothing, or was unsteady on his feet. According to the appellant, "[i]f . . . such witnesses could not discern Kirksey's impairment, how could a lay person such as the appellant . . . ?" The appellant also contends that his protesting Kirksey's speeding before the crash and the lack of proof that Kirksey's intoxication was the proximate cause of the wreck should have resulted in the trial court's granting his motion for judgment of acquittal. Finally, he contends that he did not know Kirksey and the victim were minors. The State claims that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). "The standard by which the trial court determines a motion for judgment of acquittal at the end of all the proof is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction." State v. Thompson, 88 S.W.3d 611, 614-15 (Tenn. Crim. App. 2000).

1. Vehicular Homicide and DUI

As charged in the indictment, vehicular homicide is "the reckless killing of another by the operation of an automobile . . . [a]s the proximate result of the driver's intoxication as set forth in § 55-10-401." Tenn. Code Ann. § 39-13-213(a)(2). The indictment alleged that the appellant was guilty of vehicular homicide pursuant to Tennessee Code Annotated § 39-11-402(2), which holds a person criminally responsible for the conduct of another if "[a]cting with intent to promote or assist the commission of the offense . . . the person solicits, directs, aids, or attempts to aid another person to commit the offense." The DUI statute, Tennessee Code Annotated section 55-10-401, prohibits,

[1]We note that the appellant's brief does not comply with the requirements set forth in Rule 27(a)(7), Tennessee Rules of Appellate Procedure. Pursuant to the rule, it is the appellant's duty to include in his brief an argument "setting forth the contentions of the appellant with respect to the issues presented . . . including the reasons why the contentions require appellate relief." The appellant's brief makes several arguments regarding the sufficiency of the evidence. However, the appellant has failed to apply his arguments to any specific conviction.

in pertinent part, a person from driving on the public roads and highways while under "the influence of any intoxicant . . . or . . . [t]he alcohol concentration in such person's blood or breath is eight-hundredths of one percent (.08%) or more." Any person who aids or abets in the commission of DUI as a "principal, agent or accessory, is guilty of such offense." Tenn. Code Ann. § 55-10-201.

In order for a defendant to be criminally responsible for the acts of another, he must "'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'" State v. Maxey, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting Hembree v. State, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)). The defendant's requisite criminal intent may be inferred from his "presence, companionship, and conduct before and after the offense." State v. McBee, 644 S.W.2d 425, 429 (Tenn. Crim. App. 1982). "[C]riminal responsibility is not a separate, distinct crime." State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999). A defendant convicted under a criminal responsibility theory "is guilty in the same degree as the principal who committed the crime" and "is considered to be a principal offender." Id. at 171.

Turning to the instant case, Greg Kirksey testified that he drank more than two forty-ounce beers in the hours before the accident and that he had a "buzz" at the time of the wreck. A blood test taken about three hours after the crash showed that he had a BAC of 0.15%, and Kirksey testified that he should not have been driving. Trooper Boyd, an accident reconstructionist, concluded that Kirksey was traveling at a high rate of speed when he lost control of the Malibu and slammed into a tree, ejecting and killing the victim. The Malibu's crash data retrieval box confirmed Boyd's conclusions, showing that the Malibu was traveling at seventy-eight miles per hour three seconds before it hit the tree. Kirksey testified that his having a "buzz" probably impaired his ability to realize that he was driving too fast. In light of the evidence, a rational jury could conclude that Kirksey was driving while under the influence of alcohol and that his intoxication was the proximate cause of his reckless operation of the Malibu, resulting in the victim's death.

As to the appellant's criminal responsibility for Kirksey's crimes, Kirksey testified that the appellant gave him three forty-ounce beers. Kirksey testified that he drank two of the beers in the appellant's presence and that the appellant knew he consumed them. Despite this, the appellant pulled over just before the crash and allowed Kirksey to drive. The appellant contends that he did not know Kirksey was intoxicated. However, as noted by the State in its closing argument, the appellant provided Kirksey with the equivalent of more than six, twelve-ounce beers, and the jury obviously concluded that the appellant knew Kirksey was intoxicated. The evidence is sufficient for the jury to have concluded beyond a reasonable doubt that the appellant was criminally responsible for vehicular homicide and that he aided and abetted DUI.

The appellant claims that the jury could not find him guilty because he protested Kirksey's driving at a high rate of speed. Tennessee Pattern Jury Instruction 38.07, the instruction for DUI by consent, provides that if a person in possession and control of a motor vehicle "knowingly places the vehicle in the hands of an intoxicated person, [sits with him,] and knowingly permits the intoxicated

person to operate the vehicle without protest," that person can be convicted of DUI.[2] However, Kirksey testified that he did not remember the appellant's telling him to slow down before the accident, and the jury obviously resolved the issue in favor of the State.

We note that within the appellant's sufficiency of the evidence argument, he contends that the trial court should have instructed the jury that his own intoxication could have reduced his capacity to form the necessary mental state to commit the crimes. The appellant has failed to include the jury instructions in the record before this court and, therefore, has waived his argument regarding any deficiency in the trial court's instructions to the jury. See Tenn. R. App. P. 24(b). In any event, while voluntary intoxication is not a defense, voluntary intoxication "is admissible in evidence if it is relevant to negate a culpable mental state." Tenn. Code Ann. § 39-11-503(a). However, in this case, the appellant is not entitled to relief because he failed to rely on his intoxication as a defense at trial. The appellant did not question any of the witnesses about the level of his intoxication, and the defense did not mention in its opening or closing statements that the appellant's intoxication prevented him from forming the culpable mental states required to commit the crimes. To the contrary, the appellant's detailed statement to Agent Turner demonstrated that he vividly recalled the events leading up to the crash. Therefore, despite evidence that the appellant was intoxicated at the time of the crash, there was no "evidence that the intoxication deprived the accused of the mental capacity to form specific intent," and the trial court was not required to give an instruction on voluntary intoxication. See Ben Mills v. State, No. W2005-00480-CCA-R3-PC, 2006 WL 44381, at *8 (Tenn. Crim. App. Jan. 5, 2006) (quoting Harrell v. State, 593 S.W.2d 664, 672 (Tenn. Crim. App. 1979)), perm. to appeal denied, (Tenn. 2006).

2. Contributing to the Delinquency of a Minor

An adult commits contributing to the delinquency of a minor if he or she

> contributes to or encourages the delinquency or unruly behavior of a child, whether by aiding or abetting or encouraging the child in the commission of an act of delinquency or unruly conduct or by participating as a principal with the child in an act of delinquency, unruly conduct or by aiding the child in concealing an act of delinquency or unruly conduct.

Tenn. Code Ann. § 37-1-156(a). A "delinquent act" is defined as

> an act designated a crime under the law, including local ordinances of this state, or of another state if the act occurred in that state, or

[2] The petitioner did not include the jury instructions in the appellate record. However, during closing arguments, the defense told the jury that the trial court would instruct the jury that it had to find the appellant acted "without protest." The appellant does not claim in his brief that the trial court failed to give this instruction or that the instruction was improper.

> under federal law, and the crime is not a status offense under subdivision (b)(23)(A)(iii) and the crime is not a traffic offense as defined in the traffic code of the state other than failing to stop when involved in an accident pursuant to § 55-10-101, driving while under the influence of an intoxicant or drug, vehicular homicide or any other traffic offense classified as a felony[.]

Tenn. Code Ann. § 37-1-102(b)(9). Contributing to the delinquency of a minor "may be committed in an unlimited variety of ways which tend to produce or encourage or to continue conduct with a child which would amount to delinquent conduct." Birdsell v. State, 330 S.W.2d 1, 5 (Tenn. 1959). "Since the statute is aimed at the behavior of the adult, the minor does not actually have to commit an act of delinquency for the adult to contribute to the minor's delinquency." State v. John D. Cooke, III, No. W1998-01767-CCA-R3-CD, 1999 WL 1531347, at *10 (citing Lovvorn v. State, 389 S.W.2d 252, 256 (Tenn. 1965); see Birdsell, 330 S.W.2d at 6 (Tenn. 1959)).

Count two of the indictment alleged that the appellant contributed to the delinquency of a minor by providing Greg Kirksey with alcohol. The evidence overwhelmingly shows that the appellant bought beer for Kirksey and allowed Kirksey to drive while intoxicated. Moreover, a defendant's knowledge of the victim's age is not an essential element of the offense. See Tenn. Code Ann. § 37-1-156(a). See generally Bentley v. State, 552 S.W.2d 778 (Tenn. Crim. App. 1977) (affirming defendants' convictions for contributing to the delinquency of a minor despite evidence that the seventeen-year-old victim "had physical attributes of a much older woman" and told defendants she was eighteen). The evidence supports the appellant's conviction for contributing to the delinquency of a minor as to Kirksey.

Count three of the indictment alleged that the appellant contributed to the delinquency of a minor by "encouraging the said KAYLA SMITH in the commission of an act of delinquency and/or unruly conduct." The indictment did not specify the victim's delinquent or unruly conduct. However, just before the State rested its case, it told the trial court,

> I guess the question about being out without permission -- I guess that's the reason I'm DA. We'll just stick to what I said in opening statement, the fact that this child's out with two intoxicated people, one of them driving a car. . . . I think that's the better argument anyway, I'll just stick with that.

Shortly thereafter, the defense requested that the trial court dismiss count three "in that it does not state an act or delinquent or unruly offense in the indictment" and because "there's been no proof that Kayla Smith was in any way assisted by my client in committing a delinquent or unruly offense, at least knowingly." However, the trial court refused, stating,

> Well, it's this Court's opinion that the purpose of the delinquency or unruly statute . . . was created by the legislature to hold adults to a

> higher standard and put them on inquiry as to such things as why a girl this age is out running around and the fact that he took her out and was drinking [in the] middle of the night, early morning hours. I think [the] intent of [the] legislature was, again, to hold adults to this higher standard. I think the evidence is sufficient to submit it to the jury. The fact that a specific act was not alleged in that count of the indictment would have entitled you to a Bill of Particulars, there was none, so I'm going to submit it to the jury.

Taken in the light most favorable to the State, we again conclude that the evidence is sufficient. On the evening of May 4, 2004, the appellant drank two forty-ounce beers and gave Kirksey two forty-ounce beers. The intoxicated appellant then drove Kirksey and the victim to several convenience stores and allowed an intoxicated Kirskey to drive. Although the victim had not consumed any alcohol, the appellant committed DUI, gave beer to the underage Kirksey, and allowed Kirksey to commit DUI, all in the victim's presence. The appellant also contributed to the victim's sneaking out of her home and riding around countryside without her parents' permission in the late-night and early-morning hours of May 4 and 5. Therefore, the evidence is sufficient to support the appellant's conviction for contributing to the delinquency of a minor as to the victim.

B. Mistrial

The appellant claims that the trial court erred by denying his request for a mistrial when Greg Kirksey revealed to the jury that the appellant had been driving without a license, had a prior arrest for DUI, and recently had been involved in a car accident. The appellant contends that "each of these items of information . . . was in and of itself greatly prejudicial to the defense." Although the trial court gave a curative instruction, the appellant claims that the instruction "served only to enhance the jury's awareness of this testimony." The State claims that the appellant has waived this issue because he failed to make contemporaneous objections to Kirksey's testimony and failed to raise the issue in his motion for new trial. We agree with the State. In any event, the appellant is not entitled to relief.

During Greg Kirksey's direct testimony, he stated that the appellant became nervous about driving the Malibu and wanted Kirksey to drive because the appellant did not have a driver's license and "had an accident two weeks prior to this." On cross-examination, the defense asked Kirksey, "And you told General Thompson the best you knew that he wanted you to drive because he'd lost his license; is that correct?" Kirksey answered, "Yes, sir." Later, Kirksey stated, "I remember us discussing that he didn't have a driver's license. . . . He had got a DUI before." Without any objection, the defense continued cross-examining Kirksey. The State began its redirect examination of the witness, and at the conclusion of Kirksey's redirect testimony, the defense requested a mistrial on the basis that Kirksey had testified that the appellant was driving without a license, had a car accident two weeks before the wreck in the present case, and had a prior DUI conviction. In support of the motion, the defense made an offer of proof in which an assistant district attorney testified that he had previously instructed Kirksey not to talk about the appellant's other crimes.

The trial court ruled that Kirksey's testimony about the appellant's having a prior accident "doesn't mean anything. People have wrecks all the time." The court also concluded that Kirksey's testimony about the previous accident and about the appellant's not having a driver's license were necessary "to tell the story about the facts of what happened." As to Kirksey's testimony about the appellant's prior DUI, the trial court stated that "it just went right by me. . . . I didn't hear that." The trial court denied the mistrial motion, and the defense requested that the trial court instruct the jury that the appellant lost his license due to unpaid traffic citations, not due to a prior DUI or accident. The State had no problem with the defense's request, telling the trial court that the appellant had a prior arrest for DUI but had not been convicted. When the jury returned to the courtroom, the trial court gave the following instruction:

> Ladies and gentlemen, before we broke for lunch you heard the witness Greg Kirksey testify something about the defendant having a DUI, something about a wreck that happened is why he didn't have a license. The defendant does not have a conviction for DUI. Also, the wreck, whatever it was about the wreck, had nothing to do with the reason he doesn't have a license. He didn't have a license because he had some tickets he hadn't paid, and that's the only reason he didn't have a license. So, we just wanted to make sure we clear that up and there's no confusion on those issues.

A mistrial is a procedural device that is only appropriate when the trial cannot continue without causing a miscarriage of justice. See State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). In other words, there must be a "'manifest necessity'" for a mistrial to be declared. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). "The decision of whether to grant a mistrial is within the sound discretion of the trial court. This court will not disturb that decision absent a finding of abuse of discretion." State v. Mathis, 969 S.W.2d 418, 422 (Tenn. Crim. App. 1997) (citations omitted). The burden of establishing the necessity for a mistrial lies with the party seeking it. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). This court has stated,

> "When determining whether a mistrial is necessary after a witness had injected improper testimony, this court has often considered: (1) whether the improper testimony resulted from questioning by the State, rather than having been a gratuitous declaration; (2) the relative strength or weakness of the State's proof; and (3) whether the trial court promptly gave a curative instruction."

State v. Bernie Nelson Thomas, Jr., No. W2004-00498-CCA-R3-CD, 2004 WL 2439405, at *5 (Tenn. Crim. App. at Jackson, Nov. 1, 2004) (quoting State v. Paul Hayes, No. W2001-02637-CCA-R3-CD, 2002 WL 31746693, at *4 (Tenn. Crim. App. at Jackson, Dec. 6, 2002)).

We agree with the State that the appellant has waived this issue because he failed to object to Kirksey's testimony or move for a mistrial at the time Kirksey made the statements. See Tenn. R. App. P. 36(a). He also waived the issue because he failed to include it in his motion for new trial. See Tenn. R. App. P. 3(e). Absent any waiver, the appellant is not entitled to relief. Kirksey testified about the appellant driving without a license and being involved in a prior accident during his direct examination by the State. However, nothing indicates that the State intentionally elicited the testimony. Moreover, Kirksey testified about the appellant's prior DUI during cross-examination. The State's case was strong, and the trial court promptly instructed the jury that the appellant did not have a prior DUI conviction and had not lost his license due to a prior accident. Generally, we presume that a jury has followed the trial court's instructions. See State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). Although the appellant contends that the instruction exacerbated the jury's awareness of Kirksey's testimony, the trial court gave the instruction that the appellant requested. The trial court did not abuse its discretion by denying a mistrial in this case.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE